of law, that forfeitures are never favored. And there can certainly be no clearer instance of forfeiture, than the loss of an entire bargain because of a breach which has no real effect but upon a small part of it. It is really quite impossible to draw any valid distinction between an agreement like that in the principal case, where there were to be successive deliveries, separately and independently paid for, and a series of distinct agreements on different pieces of paper. As noticed before, each little agreement is complete in itself, and may be rescinded for a breach which destroys it; but to enforce a forfeiture of all the similar agreements for a breach of one is to extend to forfeiture the greatest possible favor. It is perfectly competent for parties to embrace in their contract an express provision for rescission, and this is very frequently done. But it is certainly not consonant with the established policy of the law to *imply* a condition precedent, the breach of which shall work a forfeiture far beyond the damage caused. Whatever damage such breach does cause, the injured party must of course be compensated for; and that is all he can reasonably ask. Few contractors wilfully neglect to carry out their contracts. It would be the worst possible policy. But in large undertakings of this kind unavoidable accidents are apt to occur, and it would, as it seems to me, be monstrous to make a slight deviation from exact performance an opportunity for the other party to annul the bargain at his pleasure. To *imply* such intention is to credit the vendors with most unbusinesslike rashness.

It is impossible to deny the logic of the opinion in the principal case. It is certainly more accurate to call these agreements "transactions" than "contracts;" but as has been well said, there is no magic in words. And it is conceived that principle and the authorities will hardly warrant the Supreme Court in sustaining the decision.

LUCIUS S. LANDRETH.

Philadelphia.

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## *Superior Court of Cook County, Illinois.*

### SMITH v. BARCLAY.

Certificates of membership in the Board of Trade of Chicago are property, and as such are liable for the debts of the owner on a creditor's bill to subject them to the payment of his debts; and the debtor will be restrained from disposing of his certificate of membership, and ordered to execute a blank assignment thereof to the receiver appointed in the cause.

CREDITORS bill against the debtor and the Board of Trade of Chicago for discovery as to the debtor's ownership of a certificate of membership in the Board, and as to the nature and value of such certificate, and for an injunction to restrain the transfer thereof.

The answers of the defendants set forth that the debtor was a member of the Board of Trade in good standing, and was the owner of a certificate of membership, which was transferable only

in accordance with the rules of the board; that the market value of such certificate, if transferable under the rules, was about $1200, that there were about eighteen hundred members of the board and a large surplus in its treasury. The answers denied that the certificate was subject to compulsory transfer by order of the court, or liable in any way to the payment of complainant's debt.

On the hearing, it appeared that the fee for membership was $5000; that the value of certificates was $4000; that they were bought and sold on the market, held on speculation, and hypothecated for loans; that proper persons applying for admission to membership were always admitted; that certificates were held by dealers and commission men in the names of their brokers and employees; that when lost they were renewed, and that they were frequently transferred, the rules in that regard being complied with. The Act of Incorporation, section 6, provided: "Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations and by-laws thereof." The rules contained various provisions for the discipline, suspension, restoration, &c., of members, and also contained the following:—

"Rule XI.—Section 1. Any person of good character and credit, and of legal age, on presenting a written application, endorsed by two members, and stating the name and business avocation of the applicant, after ten days' notice of such application shall have been posted on the bulletin of the Exchange, may be admitted to membership in the association upon approval by at least ten (10) affirmative ballot votes of the board of directors, and upon payment of an initiation fee of $5000; or on presentation of a certificate of unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the rules, regulations and by-laws of the association, and all amendments that may, in due form, be made thereto.

"Sect. 2. Every member shall be entitled to receive a certificate of membership, * * * and if the member in whose name said certificate stands, has paid all assessments due, and has against him no outstanding, unadjusted or unsettled claims or contracts held by members of the association, and said membership is not in any way impaired or forfeited, it shall, upon the payment of ten dollars, be transferable upon the books of the association to

any person eligible to membership who may be approved by the board of directors, after due notice, as provided in section 1 of this rule. The membership of a deceased member shall be transferable in like manner by his legal representative. Prior to the transfer of every membership, notice of application for such transfer shall be posted upon the bulletin of the Exchange for at least ten days, when, if no objection is made, it shall be assumed the member has no outstanding claims against him."

The form of certificate issued by the board is as follows:—

"——— ——— is a member of the Board of Trade of the city of Chicago, in full and regular standing at the date thereof. The membership hereby represented is subjected to annual assessments, which being paid when due, it is transferable on the books of the corporation to any person approved by the board of directors upon surrender of this certificate and any current ticket of admission to the Exchange rooms of the board issued on account of it. Such transfers may be made in writing by the party herein named, or his legal representative in form as provided on the reverse hereof."

Printed on the back appears:—

"For value received, I hereby transfer and assign unto ——— ———, the membership in the Board of Trade of the city of Chicago, represented by the within certificate, subject to the rules and regulations of said Board of Trade, and provided said membership is found not to be forfeited or impaired."

The opinion of the court was delivered by

GARDNER, J.—As is seen, the question presented is, whether the membership of Barclay in the Board of Trade, represented by his certificate, is property which can be reached by a creditor and appropriated in any way to the payment of his debt.

So far, the state courts in Illinois have not passed upon the question, and when reference is made to the precedents in other courts, the decisions are not found to be uniform, nor are they numerous. Taking them chronologically, we find, in 1874, in *Hyde* v. *Woods*, 2 Sawyer 655, a case in which both parties seemed to assume that a membership in the San Francisco Stock Exchange was property, and the struggle was over the proceeds, the controversy being as to whether they should go to the creditors of the member who were members of the Exchange, as provided by its rules, or to his general creditors. The court assumed the

view that it was property, but limited and qualified by the conditions and provisions of the rules of the Exchange, which gave it to the creditors who were members of that body, and disposed of the proceeds accordingly. The case went to the Supreme Court of the United States, and is reported. (*Hyde* v. *Woods*, 4 Otto 523.) In that court the nature of the membership appears to have been discussed, and the court say: "There can be no doubt that the incorporeal right which Fenn had to his seat when he became bankrupt was property, and the sum realized by the assignee from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that if he had made no such assignment it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy, and that if there been left in the hands of the defendants any balance after paying the debts due to the members of the board, the balance might have been recovered by the assignee." Farther on in the opinion the court again refers to the membership as property, subject only to the conditions imposed by the rules of the exchange.

In 1876, the question arose in the United States District Court, for the Northern District of Illinois, in a bankruptcy case, reported as *In re Sutherland*, 6 Bissell 526, and Judge BLODGETT held that a membership in the Chicago Board of Trade was not property, and did not go to the assignee in bankruptcy; that the certificate of membership conferred "no property right," but only "a mere personal privilege," and likened it to a membership in a Masonic body, or a religious or social organization.

In 1877, the same question arose in the Superior Court of the city of New York, in *Ritterband* v. *Baggett*, 4 Abb. N. C. 67, where, in a proceeding supplementary to execution, in substance like the case at bar, and where the claim was that a membership in the New York Cotton Exchange was not property which should go to the receiver, the court held otherwise, and referred to *Hyde* v. *Woods*, 4 Otto 523.

In 1880, in a case not yet reported, but referred to in 10 Central Law Jour. 500, and Albany Law Jour. 501, as *Grocers' Bank* v. *Murphy*, the Common Pleas Court of New York city decided exactly the opposite to the decision above cited in the Superior Court of that city.[1]

[1] This case was reversed on appeal. See Dos Passos on Stock Brokers 91; N. Y. Daily Reg., March 12th 1881.

In 1880, in two cases in the Supreme Court of Pennsylvania, viz.: *Thompson* v. *Adams*, 93 Penn. St. 55, and *Pancoast* v. *Gowen*, Id. 66, that court held a seat in the Philadelphia Board of Brokers as "not property in the eye of the law," but a mere "license to buy and sell at the meetings of the board," and not subject to execution, attachment or garnishment at the suit of a creditor. *Hyde* v. *Woods*, is referred to, but not regarded as authority on the principal question.

In 1880, in the United States District Court, for the Southern District of New York, reported as *In re Ketchum*, 1 Fed. Rep. 840, a case in bankruptcy, in which there was an application for an order requiring the bankrupt, Ketcham, to make a transfer of his seat in the New York Stock Exchange to the assignee in bankruptcy, or to such person as the assignee may procure as a purchaser, the court sustained the motion and made the order.

The court, CHOATE, J., says: "I think the case cannot be distinguished in principle from the case of *Gallagher* v. *Lane*, 19 N. B. R. 224, in which it was determined that a Washington market lease was property that belonged to the assignee. As in that case the consent of the city was necessary to transfer, so here the consent of a committee of the Stock Exchange is necessary to a transfer of this right. The seat, however, has an actual pecuniary value, which the rules of the society, as interpreted and applied in practice, permit the holder to realize by a sale and transfer. There is no practical difficulty in effecting a transfer of this right or interest for a pecuniary consideration, subject to the condition that the debts of the present holder to members are first paid; and the right or privilege is to all intents and purposes a business right or privilege, useful for business purposes only. I see nothing in the rules of the Exchange which renders it impossible for the seat to be disposed of by the assignee in bankruptcy, with the co-operation of the bankrupt, subject to the condition above mentioned. The equity of the creditors in the matter is as obvious as in the case of the market lease. This seat in the board was actually used as a part of the business capital of these bankrupts as stockbrokers. To suffer the bankrupts still to hold it virtually withdraws several thousand dollars in value of their business assets from the creditors."

*Hyde* v. *Woods*, 4 Otto 523, is in no way distinct from the one under consideration. "The controlling consideration is, as it

seems to me, that practically, and whatever its form or incidents with respect to other matters may be, it is a part of the bankrupt's business assets, or more generally, of his property, which it was the primary design of the bankrupt law to distribute among his creditors, and that the peculiarities which distinguish this from other property are, in view of the evident purpose and scope of the bankrupt law, unessential; mere technicalities—cobwebs—which the law is strong enough to break though." [Per CHOATE, J., *In the matter of Ketchum, supra.*]

So far as is disclosed in the reports, in all these cases the provisions of the various boards regarding memberships and their transfer were, in all essential matters, similar to those of the Chicago Board of Trade, some of them rather narrower, in that transfers could only be made to members elect, while, as we have seen, the provision of the Chicago Board makes them transferable "to any person eligible to membership, who may be approved by the Board of Directors," a distinction, perhaps, with little practical difference.

As is seen, the authorities are conflicting, but it seems to me that the weight of sense and reason is with those which hold these memberships are property.

An actual investment of a large sum of money is necessary for their procurement; they are available as assets, either by sale or hypothecation, they are transferable by the holder, or his legal representative in case of his decease; the conditions attending their transfer are, practically easy of fulfilment, and their conversion into money, or money's worth, at the will of the holder, is a matter of no practical difficulty. To hold them not property is to place beyond the reach of the law a large amount of actually available and convertible assets which, in almost any other conceivable form, could be readily reached by the proper legal methods, and appropriated to the payment of the debts of the holder.

Let a decree be entered enjoining the defendant, Barclay, from otherwise disposing of his certificate of membership, and that he execute a blank assignment of such certificate, and deliver the same with such certificate, and the ticket of admission issued thereon to the receiver in this cause.

Unincorporated stock exchanges, boards of brokers or boards of trade, in the manner in which they are usually constituted, are neither joint stock companies nor partnerships, as between the members thereof, whatever may be their

relations to third parties: *White* v. *Brownell*, 4 Abb. Pr. (N. S.) 162, 191; s. c. 3 Id. 318; *Leech* v. *Harris*, 2 Brewst. 571, 575; *Caldicott* v. *Griffiths*, 8 Exch. 898; 1 Lind. on Part. *56, 57.

There may be property belonging to such a body, derived from the payment of dues or fines, or consisting of the furniture of the room where the board meets; but the possession of it is a mere incident, and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportionable part of it upon withdrawing. He has merely the enjoyment and use of it while a member, but the property remains with and belongs to the body while it continues to exist; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets: *White* v. *Brownell*, *supra*. Per DALY, F. J., citing, *St. James Club*, 13 Eng. L. & Eq. 592; *Fassett* v. *First Parish in Boylston*, 19 Pick. 361.

As to the nature of the right of membership, a seat in one of these bodies is said to be a species of incorporeal property—a personal, individual right to exercise a certain calling in a certain place, but without the attributes of descendibility or assignability which are characteristic of other species of property: Dos Passos on Stock Brokers 87. The ownership of a seat is not absolute and unqualified, but is limited and restricted by the rules of the body issuing the same. The owner can not sell the seat to a person whom the body will not recognise: *Hyde* v. *Woods*, 94 U. S. 523; Dos Passos on Stock Brokers 87, citing *White* v. *Brownell*, 3 Abb. Pr. (N. S.) 318; *Leech* v. *Harris*, 2 Brewst. 571. Neither can it be directly seized on attachment or execution at the suit of a creditor of the owner: *Allen, Jr.* v. *N. Y. Cotton Exchange*, N. Y. Daily Reg., March 31 1881; *Pancoast* v. *Gowen*, 93 Penn. St. 66; *Thompson* v. *Adams*, 93 Penn. St. 55. In *Pancoast* v. *Gowen*, *supra*, the court in delivering their opinion, say: "A seat in the board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately, a license to buy and sell at the meetings of the board. It certainly could not be levied on and sold under a *fi. fa.* The sheriff's vendee would acquire no title which he could enforce, nor is it within either the words or the spirit of the Act of June 16th 1836, sect. 35 (Pamph. L. 767), providing for attachment on judgment. Whether the proceeds of the sale of the seat in the hands of the treasurer of the board, and payable to the defendant, according to the regulations and by-laws of the board, could be thus reached, is an entirely different question. This, and no more, is what we understand to have been decided by the Supreme Court of the United States in *Hyde* v. *Woods*, 4 Otto 525, where Mr. Justice MILLER says, 'If there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee' in bankruptcy." In this case upon a judgment obtained by Pancoast against Houston, an attachment execution was issued and served upon Gowen and others, trading as The Philadelphia Stock Exchange, as garnishees. The answers of the garnishees admitted that Houston, the defendant in the judgment, owned a seat in the stock exchange, against which there were no claims by the members of that body at the time the attachment was issued, but they alleged that claims had since been presented, and that Houston held his seat subject, among others, to the conditions below stated; so that the real question involved in the case appears to be whether the seat was subject to direct sale on an attachment-

execution or writ of garnishment; and, there having been no attempt to invoke the equity powers of the court, it does not appear to have been necessary to decide that a membership was in no sense property, and hence there is no real conflict between this case and those cases where the equity powers of the court were invoked. In *Evans* v. *Wister*, Sup. Ct. Penn., 1 Weekly Notes Cases 181, it was also held, that an attachment would not lie against the board of brokers for the proceeds of the sale of the seat of a member who was indebted to other members to an amount exceeding the proceeds of his seat.

In *Thompson* v. *Adams*, *supra*, the court says that the seat is not property in the eye of the law, and cannot be seized in execution for the debts of the members; but the point actually decided was, that under the constitution and by-laws of the board, an equitable owner of a seat, who has furnished the money with which the legal owner obtained the seat, but who is unknown to the association, can not share in the proceeds of the sale of the seat upon the death of the legal owner, as against members of the board who are creditors of the legal owner. By the constitution of the Philadelphia Stock Exchange, a seat in which was in controversy in the cases above cited, members held their seats subject to the following conditions: Any member had the right to sell his membership to such person as should be approved by the board, provided there were no unsettled contracts or claims against him by any member of the exchange for stock transactions; and on the death of a member his seat might be sold by the secretary, and after satisfying the claims of members, the balance was to be paid to his personal representatives. The proceeds of a seat, if sold, were to belong to the owner's creditors, being members of the exchange, in proportion to the amounts of their respective claims. Similar provisions appear to have been adopted in the various stock boards throughout the country, so far as we can judge by the reported cases.

Although, however, the seat of a member cannot be levied upon and sold by direct legal process, the better opinion seems to be, as held in the principal case, that a membership in such a body, especially where, as in the principal case, it is so treated by the rules and practice of the board, is a species of property, and that the courts will, by the exercise of their equity powers, or by process in aid of execution, compel an insolvent member to do whatever may be needful to transfer his seat under the rules of the board, and apply the proceeds in satisfaction of his debts: Dos Passos on Stock Brokers 92; *Grocers' Bank* v. *Murphy*, N. Y. Daily Reg., March 12, 1881; *Ritterband* v. *Baggett*, 4 Abb. N. C. 67; *Campbell* v. *N. Y. Cotton Exchange*, N. Y. Daily Reg., January 11, 1881; *In re Ketcham*, 9 Rep. 305; s. c. 1 Fed. Rep. 840. See, also, *Hyde* v. *Woods*, 94 U. S. 523. The weight of authority, also, seems to be that the incorporeal right of membership in such a board passes to the assignee in bankruptcy of the owner, subject to the rules of the stock board: *Hyde* v. *Woods*, *supra*; *In re Ketcham*, *supra*. See, however, *contra*, *In re Sutherland*, 6 Biss. 526.

The law upon this subject has been excellently summarized by Mr. Dos Passos, in his recent work on Stock Brokers and Stock Exchanges, page 96, as follows:

"All the cases can be reconciled by keeping in view the circumstances under which they arose; and the following propositions may be deemed as settled:

1. "That, in the disposition of a seat, or the proceeds thereof, the members of the exchange will be preferred to outside creditors.

2. "That the seat is not the subject

of seizure and sale on attachment and execution.

3. "That the proceeds of a seat, in the hands of the exchange or its officers, are capable of being reached, after the claims of members have been satisfied, to the same extent, and in the same manner, as any other money or property of a debtor.

4. "That a person owning a seat in the exchange, can be compelled, by proceedings subsequent to execution, or under the direction of a receiver, to sell his seat to a person acceptable to the exchange, and devote the proceeds to the satisfaction of his judgment debts."

As to the point discussed in the principal case the cases do not seem to make any distinction, and there does not seem to be any distinction in principle between unincorporated boards, and those which have been incorporated, so long as the objects of the boards and their rules and regulations are the same; and tested by the cases above cited, the ruling in the principal case would seem to be correct in principle, and well grounded on authority.

MARSHALL D. EWELL.

Chicago.

## ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ARKANSAS.[2]

SUPREME COURT OF IOWA.[3]

SUPREME JUDICIAL COURT OF MAINE.[4]

SUPREME COURT OF OHIO.[5]

SUPREME COURT OF WISCONSIN.[6]

### AGENT.

*Promissory Note—Payment.*—Authority to sell property as agent, and take a note therefor in the name of the principal, does not include authority to receive payment of the note after it has been delivered to the principal: *Draper* v. *Rice*, 56 Iowa.

### ATTACHMENT. See *Garnishment.*

### ATTORNEY.

*Authority to release Attachment.*—An attorney-at-law, having control of a suit, has control of the remedy and the proceedings connected therewith, and may release an attachment of real or personal property, and such release will bind his client as between such client and a party

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1881. The cases will probably appear in 14 or 15 Otto.

[2] From B. D. Turner, Esq., Reporter; to appear in 37 Arkansas Reports.

[3] From Hon. John S. Runnells, Reporter; to appear in 56 Iowa Reports.

[4] From J. W. Spaulding, Esq., Reporter; to appear in 73 Maine Reports.

[5] From E. L. DeWitt, Esq., Reporter; to appear in 37 or 38 Ohio St. Reports.

[6] From Hon. O. M. Conover, Reporter; to appear in 54 Wisconsin Reports.